Supreme Court, U.S.
FILED
FEB 11 2000
CLERK

(3)

No. 99-1156

IN THE

Supreme Court of the United States

PLANNED PARENTHOOD OF WISCONSIN; GARY T. PROHASKA, M.D.; FREDERIK F. BROEKHUIZEN, M.D.; GAVIN JACOBSON, M.D.; NEVILLE SENDER, M.D.,

Petitioners,

v.

JAMES E. DOYLE, in his official capacity as the Attorney General of State of Wisconsin; and DIANE M. NICKS, in her official capacity as District Attorney for Dane County and as representative of a class of all District Attorneys in Wisconsin,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO COMBINED MEMORANDUM OF RESPONDENTS

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RULE 29.6 LISTING

Planned Parenthood of Wisconsin, Inc. is the only party that is a corporation, and it has no parent corporation and no publicly held company owns 10% or more of its stock.

REPLY TO COMBINED MEMORANDUM OF RESPONDENTS

Given that this Court has granted certiorari in *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *cert granted in part sub nom., Stenberg v. Carhart*, __ U.S. __, 120 S.Ct. 865 (2000), petitioners believe that the appropriate disposition of their pending petition would be to postpone its consideration until after a decision in *Stenberg*. We believe this case adds nothing to aid this Court's decision-making process on the issues presented in *Stenberg*, and raises no issues different that those raised in *Stenberg*.

Respondents assert three reasons why this Court should grant certiorari now. We reply briefly to each of those assertions below.

1. Respondents assert that there are "significant differences" between the Wisconsin statute at issue here and the Nebraska statute at issue in *Stenberg, Combined Memorandum of Respondents* (*Resp't Mem.*) at 4, specifically, that the Nebraska statute prohibits delivery of an intact living fetus or a substantial portion of an intact living fetus, while the Wisconsin statute "requires the delivery of an intact body into the vagina." *Id.* at 5. That is not what the Wisconsin statute says. It forbids any abortion in which the doctor, "*partially* vaginally delivers. . ." *Pet'r App. 102a*. This language could be more far-reaching than the Nebraska statute because it does not even require that the partial delivery be of a "substantial portion" of the fetus; however, in the view of the Eighth Circuit "'partially' is not appreciably different from 'substantial portion.' The effect is the same." *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794, 798 (8th Cir. 1999); *see also*, *Stenberg Pet. for Cert.* at 7 ("statutes reviewed by the Seventh and Eighth Circuits. . . define partial-birth abortion in substantially the

same terms."). There is certainly no difference between the Wisconsin and Nebraska statutes that necessitates granting certiorari in this case in advance of a decision in *Stenberg*.

2. Respondents also assert that this case "squarely presents the issues of the vagueness standard to be used for abortion statutes and of whether it is an 'undue burden' . . . to limit the availability of one method of abortion . . . ," and that these issues were not addressed by the lower courts in *Stenberg*. *Resp't Mem. at 4*. The first assertion exalts words over substance. Both *Stenberg* and this case present the same threshold question: does the statutory language impose a ban on a wide range of abortions, or is that language reasonably susceptible of a narrowing construction that would save the statute. The second assertion is wrong. The district court in *Stenberg* addressed the exact constitutional question posed by respondents (of banning a precisely defined D&X procedure) in great detail. *Carhart v. Stenberg*, 11 F.Supp.2d 1099, 1105-1108, 1110-1113, 1122-1127 (D. Neb. 1998). Thus, there is nothing new to be added by consideration of the Wisconsin case at this time.

3. Respondents imply that the issue of legislative intent is somehow different in the Wisconsin case than in the Nebraska case. *Resp't Mem.* at 6. The issue of legislative intent is the same in both cases. *Compare, Carhart v. Stenberg*, 11 F.Supp.2d at 1130 (review of legislative history refutes intent that legislature did not intend to ban D&E) and *Planned Parenthood v. Doyle*, 9 F.Supp.2d 1033, 1042 (W.D.Wisc. 1998) (denying preliminary injunction) (discussing fact that Wisconsin Legislature rejected amendments that would have narrowed definition of partial-birth abortion).

This case differs only in peripheral ways from *Stenberg*. The proper course for the Court would be to postpone consideration of petitioners' petition until after the disposition of *Stenberg*. In all likelihood, *Stenberg* will resolve all of the issues here, and this case will be capable of summary disposition in light of *Stenberg*.[1]

CONCLUSION

For the forgoing reasons, consideration of the Petition for a Writ of Certiorari should be postponed pending the Court's consideration of *Stenberg v. Carhart*.

Respectfully Submitted,

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[1] Petitioners note that respondents have also suggested that this case be placed on the same schedule as *Stenberg*. Petitioners oppose that suggestion. If certiorari is granted, petitioners' attorneys will need the full time allowed by the Court's rules to present their case.